mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage is in arrear and unpaid for one month after becoming due.

It is clear that under section 25 (a) notice requiring payment of the mortgage money must be served on one of the mortgagors and there must be default for 3 months after such service before the mortgagee is entitled to exercise his power of sale under this sub-section.

Section 25 (b), however, simply states in effect that the mortgagee shall not exercise his power of sale "unless and until some interest under the mortgage is in arrear and unpaid for one month after becoming due."

In the present case plaintiff does not attempt to come under section 25 (a) but he claims to come under section 25 (b).

It is clear that when he exercised his power of sale on January 15th, 1948 there was more than 3 months' interest in arrears. Can it be said that he acted (i) illegally, or (ii) oppressively, in acting as has been set out above?

I cannot find any authority which lays it down that any notice to the mortgagor is necessary before a sale is held under section 25 (b), probably because the mortgagor must be taken to know that he is liable to have the mortgaged property sold as soon as he falls into arrears with his interest — a fact peculiarly within his own knowledge. Under section 25 (a) notice must be served on him because, unless it were served, he would have no means of knowing that there was the possibility of a sale. On the other hand if it were necessary to serve him when interest is in arrears then he could avoid or delay having the property sold by keeping out of the way.

I am fortified in this view by the judgment of Wood J. in *Jenaiboo v. Narainan Chetty & Anor.*[1]. After citing the judgments of Kay J. in *Warner v. Jacob*[2] and of Lord Cottenham (L.C.) in *Jones v. Matthie*[3] Wood J. remarks :—

> The principle enunciated in those two cases of **Jones v. Matthie** and **Warner v. Jacob**, seems to me to give to a mortgagee exercising a power of sale with every ingredient of disregard to the feelings and interests of others — of negligence and imprudence short of actual fraud — complete impunity. As Mr. Van Someren allowed me to put it, if suddenly without notice and without preparation, but still without fraud, the mortgagee resolved to sell the mortgaged premises at an auction held on that very day, he would not be answerable.

He then went on to state that such was the law in England and it appears that the law in England then and now was and is in close conformity with section 25 of the Conveyancing and Law of Property Ordinance.

Also I hold that, after the correspondence that had passed between the parties or their solicitors, and taking into account that Notice of the auction was twice published in the local Penang paper, it cannot be said that the plaintiff acted oppressively or unfairly towards the defendant.

Mr. Isaac for the defendant put in a somewhat late Amended Counterclaim but he argued very little in support of it.

I hold that the defendant fails on both his Defence and Counterclaim and give judgment for the plaintiff on his claim for $1,857 and on the Counterclaim with costs.

Judgment for plaintiff.

ONG AH KIM v. REX.

[A. Cr. J. (Gordon Smith Ag. C.J.) September, 11, 1948]

[Singapore — Magistrate's Appeal No. 91 of 1948]

Opium and Chandu Proclamation — Powers given to Comptroller of Customs to make rules with approval of the Deputy Chief Civil Affairs Officer — Whether rules published as made "with the approval of the Governor" are valid — Transfer of Powers and Interpretation Ordinance No. 2 of 1946.

The principal point raised in this appeal is that the amendment to s. 15 of the Opium and Chandu Rules 1948 by the Opium and Chandu (Amendment) Rules 1948 is invalid, as the amending rule was stated to be made "with the approval of the Governor" and not with the approval of the Colonial Secretary, who takes the place of the Deputy Chief Civil Affairs Officer, who is specified in s. 22 of the Opium and Chandu Proclamaton.

Held: (1) there is nothing to prevent the Governor himself exercising approval even where such approval has been delegated to the Colonial Secretary by legislative act and that in this case it was clear that the Colonial Secretary must himself have approved the rule prior to its formal submission to the Governor and subsequent publication in the Gazette; (2) the amending rule therefore had received the requisite approval prior to publication in the Gazette.

Cases referred to :—

(1) *R. v. Ho Soon Lye* 2nd District Court Case No. 3466 of 1947.

(2) *R. v. Teoh Ah Lai & Ors.* (1948) M.L.J.

(3) *Derby v. Bury Improvement Commissioners* L.R. 4 Ex. Case 222.

MAGISTRATE'S APPEAL.

D. K. Walters for the appellants.

Gordon Smith Ag. C.J. : — This appeal was heard on the 8th instant at the conclusion of which I reserved judgment as it involved highly technical matters arising out of Rule 15 of the Opium and Chandu Rules, 1948, issued under the authority of section 22 of the Opium

and Chandu Proclamation No. 43 of 1946 (B.M.A. Gazette p. 72). There was also an appeal on the 2nd charge and conviction under sections 116 and 161 of the Penal Code (illegal gratification).

Numerous grounds of appeal were set out in the Petition in regard to Rule 15 as amended, but Mr. Walters confined his argument in this respect to one brief point, which I will deal with first.

This point does not attack the substance of the amended Rule 15 but the manner in which such rule was amended by the Opium and Chandu (Amendment) Rules, 1948, dated the 22nd March 1948 and which appear under notice S.89 in the Supplement to the Gazette of the 25th March 1948.

The preamble states that the amending rule is made under section 22 of the Proclamation and by virtue of section 2 of the Transfer of Powers and Interpretation Ordinance, 1946, "with the approval of the Governor", and it is this approval, and it not being made with the approval of the Colonial Secretary, that Mr. Walters argued vitiates the whole Rule. I might mention that a similar notice was made on the 9th June 1948 wherein such approval was given by the Colonial Secretary. I might also mention that the cause for the original amendment of Rule 15 as regards its substantive effect was because such rule, as originally framed, was held to be *ultra vires* (see judgment in *Rex v. Ho Soon Lye*[1]).

Mr. Walters did not contest this validity of the substantive effect of the amending rule as being *ultra vires*. Neither had he nor the Court required the attendance of the Government Chemist as a witness, as provided for in the amending rule. It is, therefore, on purely technical grounds that the rule was attacked.

Section 22 of the Proclamation states that "The Comptroller may from time to time with the approval of the Deputy Chief Civil Affairs Officer make rules ...." It is not disputed that the Comptroller now means the Controller of Customs who made the rule now in question. Nor is it disputed that the Deputy Chief Civil Affairs Officer now means the Colonial Secretary, see the Third Schedule to Ordinance No. 2 of 1946, in which also the Governor is substituted for the Chief Civil Affairs Officer. It is because the amended rule is stated to have been made with the approval of the Governor and not with the approval of the Colonial Secretary that the validity of the whole notice is attacked.

The learned District Judge rejected this contention stating "that although it would have been sufficient for the Controller of Customs to obtain the approval of the Colonial Secretary, he went further and obtained the approval of the Governor, which approval is binding on the Colonial Secretary who incidentally (by command of the Governor) published the rules in the Gazette."

All the authorities quoted dealt with the question of whether some subsidiary legislation or legislative act was *ultra vires* the enabling legislation and it is not surprising that it has been impossible to trace any authority dealing directly and specifically with the particular point before me. The nearest was the case of *Rex v. Teoh Ah Lai & Ors.*[2] in which the point of law was as to whether the power of the Legislative Council under section 3 of the Departmental Titles (Alteration) Ordinance No. 15 of 1937 had been transferred to the Advisory Council, and Mr. Justice Thorogood held that such had not been so effected and could not be so effected without proper legislative authority. That is not the case here and we are merely concerned with a *pro forma* ministerial approval to a legislative act which legislative act is otherwise quite in order and *intra vires* the enabling legislation.

The Governor is the Chief ministerial and executive officer (see section 6 of the Order in Council, 1946). The Colonial Secretary is his deputy and may exercise such powers as may be delegated to him either by legislative act or by ministerial act in writing by the Governor (see section 11 of Ordinance No. 2 of 1946 and particularly the proviso thereto).

In my opinion there is nothing to prevent the Governor himself expressing approval even where such approval has been delegated to the Colonial Secretary by legislative act.

Further, there is considerable substance in what the learned District Judge has ruled, as quoted earlier. In other words the Colonial Secretary must himself have approved the rule prior to its formal submission to the Governor and subsequent publication in the Gazette, and the old maxim *omnia praesumuntur rite et solemniter esse acta* (all acts are presumed to have been done rightly and regularly) appears to cover the point. Such is supported in the judgment of the Court delivered by Willis J. in *Derby v. Bury Improvement Commissioners*[3], at p. 226, as follows: "In the absence of any proof to the contrary, credit ought to be given to public officers who have acted, *prima facie*, within the limits of their authority, for having done so with honesty and discretion." Still further does the point appear to be covered in the Interpretation Ordinance (Cap. 2), Part III, General Provisions, section 4 para. (f).

I therefore confirm the judgment by the learned District Judge in this respect and hold that the amending Rule in question had received the requisite approval prior to publication in the Gazette.

As regards the charge of illegal gratification, the learned District Judge stated that he was satisfied that the two Police witnesses were truthful and reliable witnesses, and it is evident that he had given close consideration to the criticisms of such evidence by Mr. Walters, which criticisms were repeated before me. In effect Mr. Walters submitted that there was no offer of a bribe but that $500 had been produced by the accused at the instigation of the Corporal. It is quite clear that the money was produced by the appellant and offered as 'coffee money' by way of a bribe to avoid the consequences of being caught red handed with a considerable quantity of opium in his possession and such possession was not and could not be disputed. I uphold the conviction on this count also.

The learned District Judge passed a sentence on the first charge of 6 months r.i. and on the 2nd charge of 3 months r.i. to run concurrently with the 6 months, as the 2nd offence arose out of the first. In effect this is no punishment at all for the 2nd offence, an offence which is said to be very common and one for which it is very difficult to secure a conviction. I think that the 2nd sentence should at least have been made to run consecutively to the first sentence of 6 months r.i., and I so order. Even so I consider that the accused has been leniently dealt with.

Order accordingly.

YAP YEOK v. PUBLIC PROSECUTOR.

[A. Cr. J. (Laville J.) September 14, 1948]

[Johore Bahru — Criminal Appeal No. 13 of 1948]

Criminal Procedure — Prosecution witness offered for cross-examination — Interrogation of witness by District Judge before cross-examination — Opium and Chandu Proclamation s. 3(1).

This was an appeal against the conviction of the appellant for possession of chandu. One of the grounds of appeal was that when a prosecution witness was offered for cross-examination at the trial, he was interrogated by the learned District Judge before the defence cross-examined him.

Held: (1) while it is more correct, when a prosecution witness is offered for cross-examination, for the trial Judge to postpone his interrogation till after the cross-examination and re-examination, if any, of such a witness it is always open to a trial Judge to question any witness in the interests of justice; (2) on the facts of the case, the procedure followed by the trial Judge did not in any way harm the accused s case or embarrass him.

MAGISTRATE'S CRIMINAL APPEAL.

M. Ismail for the appellant.

W. M. McCall (D. P. P.) for the respondent.

Laville J. : —Yap Yeok of Johore Bahru was charged before the District Judge, South Johore, with being in possession of a certain amount of chandu in a hut behind Jalan Trus about midnight on 29th May, 1948, and convicted on 10th July, 1948, of an offence under section 3(1) of the Opium and Chandu Proclamation No. 49.

The prosecution evidence was that of the Asst. Superintendent of Customs (Preventive Branch), Mohamed Sam bin Haji Abdul Rahim, and two O.D.O.s. A third O.D.O., Lim Pah Bah, was offered for cross-examination by the defence. The evidence of all these officers who were present when the hut was entered was that the accused was found therein in close juxtaposition to the chandu and the means of smoking it; that he said on being questioned that the hut was his, rented from a Malay. The O.D.O. offered for cross-examination gave evidence that accused on being taken away produced a lock and locked the door of the hut. Two other persons were in the hut and were searched, but nothing incriminating was found on them and they were allowed to go and were not called as witnesses.

The defence was that the accused lived not in the hut but at 22, Jalan Jin Quee; he produced rent receipts for rent paid for 22, Jalan Jin Quee, and called a witness who had visited him there prior to 29th May, 1948 and subsequently also. He denied ownership of the chandu and smoking materials found in the hut and said he had gone there to look for a friend and had been invited in by the other two men found there.

The learned District Judge believed the evidence of the prosecution and under the provisions of section 3(2) of the Proclamation presumed that accused was in possession of the chandu and smoking implements found and that he had not discharged the onus cast on him of disproving possession. He accordingly convicted accused and, as he had no previous convictions, sentenced him to 6 weeks simple imprisonment.

The first ground of appeal taken by accused is that the evidence of the Asst. Superintendent of Customs (P.B.) and the O.D.O.s was not to be believed because their incrimination of accused seemed to be an after thought when the other two persons escaped. There is no merit in this ground. Their evidence is that accused admitted ownership of the hut and that the other two inmates were not near the chandu or smoking implements and did not escape, but were allowed to go as nothing was found on them. There are no grounds whatever to suspect the genuineness of this evidence.

The second ground too must fail, namely that the other two inmates of the hut were not called by the prosecution; there was no reason why the prosecution should call these men as there was ample evidence